United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2191

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

NO. 74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, etc., et al,

Plaintiffs-Appellants,

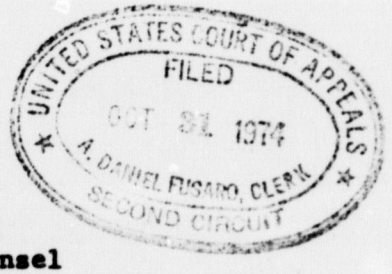
- against -

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR THE NEW YORK STATE DIVISION OF HUMAN RIGHTS AS AMICUS CURIAE



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QUESTION PRESENTED

The complaint alleges that defendant fails and refuses to provide to female employees disabled by reason of maternity the rights, benefits and privileges provided by defendant to male employees disabled for other reasons, and that by such disparity defendant discriminates against its female employees because of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e). The District Court, relying upon Geduldig v. Aiello, U.S. , 41 L. Ed. 2d 256 (1974), dismissed the complaint sua sponte, with leave to replead, and certified to this Court pursuant to 28 U.S.C. § 1292(b) the question whether Aiello has established that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on

the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment. 379 F. Supp. 679. On September 3, 1974 this Court granted plaintiffs' petition for leave to appeal.

Included in the broad question certified to this Court is the narrower question which is the focus of the interest of the New York State Division of Human Rights as amicus curiae: whether an employer's exclusion of maternity-related disabilities from the sick leave benefits, disability benefits, insurance payments and other benefits and privileges made available by the employer for other nonoccupational disabilities sustained by employees constitutes discrimination as to sex forbidden by Title VII.

INTEREST OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS

The New York State Division of Human Rights (hereinafter "the Division") is the nation's oldest fair employment practices commission. It was created in 1945 in exercise of the State's police power for the protection of the public welfare, health and peace of the people of the State of New York, and in fulfillment of the provisions of the Constitution of this State concerning civil rights. L. 1945 ch. 118. Over the years the jurisdiction of the Division has been enlarged; the Division's jurisdiction over sex discrimination derives from legislation which became effective September 1, 1965. L. 1965 ch. 516. The opportunity to obtain employment without such discrimination has been declared a civil right. N. Y. Executive Law Art. 15 (known as the Human Rights Law) § 291.1. The Division's jurisdiction over sex discrimination in employment

includes hiring, discharge, compensation and terms, conditions and privileges of employment. Human Rights Law § 296.1(a).

The Division and the New York State Human Rights Appeal Board interpret and apply the Human Rights Law as equating with discrimination as to sex an employer's differentiating between employees on the basis of pregnancy or maternity. The Court of Appeals of the State of New York has unanimously sustained (without discussion) this interpretation of the statute. Bd. of Educ. v. Div. of Human Rights, 42 App. Div. 2d 49 (Second Dept. 1973), affirmed, N.Y. 2d (1974) (slip opinion dated Oct. 7, 1974); Board of Education of Union Free School District No.22 v. State Division of Human Rights, 42 App. Div. 2d 600 (Second Dept. 1973), affirmed, N.Y. 2d (slip opinion dated October 7, 1974); Board of Education of the City of New York v. State Division of Human Rights, 42 App. Div. 2d 854 (Second Dept. 1973), affirmed, N.Y.2d (slip opinion dated Oct. 7, 1974). These cases -- all of them decided after Geduldig v. Aiello, supra, 41 L.Ed.2d 256 (1974), and after oral argument as to its impact -- upheld orders of the Division directing employers to allow employees to continue working during pregnancy until the onset of actual physical disability, to return to employment upon recovery from such disability, and to receive accrued sick leave and disability benefits and other fringe benefits for the duration of such disability. The highest court of the State of New York has thus ruled that differentiation by an employer between employees on the basis of pregnancy or maternity, whether as to commencement or continuance of leave or as to allowance of fringe benefits, constitutes discrimination as to sex.

The Division argues in this brief that the court below misreads Aiello and misconceives its effect upon employers and upon the fair employment legislation which plaintiffs invoke. The interest of the Division in this appeal, however, goes beyond the question of such misreading. Even if this Court should affirm the decision below, the Division is bound by the decisions of the State Human Rights Appeal Board which were sustained in the cases cited above, Human Rights Law § 297-a.7, and is therefore under statutory duty to persist in equating with discrimination as to sex an employer's differentiation between employees on the basis of pregnancy or maternity. In so persisting, the Division will reflect the State's determination, expressed in the Human Rights Law and in authoritative interpretation of that Law, "to extend the area of non-discrimination beyond that which the Constitution itself exacts", Frankfurter, J., in Railway Mail Association v. Corsi, 326 U.S. 88 (1945). Affirmance by this Court of the decision below, however, would hinder the Federal courts and the Equal Employment Opportunity Commission from making the same equation in interpreting and applying Title VII. The consequences would be anomalous and unfortunate: Title VII, although similar to the Human Rights Law, in terms, purpose and legislative intent, would have to be interpreted differently. Its prohibitions against discrimination as to sex could not be applied to employers reducing or curtailing fringe benefits for employees disabled by reason of maternity. The Division would possess wider enforcement power over sex discrimination than the Federal government. Quite apart from any confusion and inconvenience this anomaly might impose upon persons claiming to be aggrieved of such discrimination, the Division's personnel and budget may not suffice to meet the full extent of additional case load.

For nine years, the Division has benefited, in the exercise of its own jurisdiction and enforcement power over sex discrimination, from the guidance and experience of the Federal courts and the EEOC in construing Title VII. The Division would be adversely affected by any reduction of their jurisdiction or enforcement power over this pervasive and stubborn aspect of discrimination.

The latest amendment to the Human Rights Law, L. 1974 ch. 988, forbids employers from discriminating against employees who are disabled. The Constitutionality of legislative classifications based on particular physical conditions was upheld in Aiello. 41 L.Ed.2d at 264-5 n.20. Affirmance by this Court of the decision below might raise questions as to the Constitutionality of this legislation.

THE DECISION BELOW AND SUMMARY OF ARGUMENT

The decision below dismisses plaintiffs' complaint with leave to replead and certifies to this Court the question "whether Aiello has established for the purpose of [this action]... that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment." 379 F. Supp. at 684.

The Division makes no argument with respect to either the certification or the wording of this question. The focus of the Division's argument is the rationale spelled out by the District Court as the basis for what it regards as the correct answer. The District

Court reads Aiello as changing the obligations of employers under Title VII. Under what the District Court labels "pre-Aiello law", disparity with respect to pregnancy-related disabilities in and of itself constituted discrimination on grounds of sex. Post-Aiello law, according to the District Court, is just the opposite, permitting such disparity in fringe benefits of employment unless the disparity can be shown to be "mere pretext designed to effect an invidious discrimination against the members of one sex or the other". 379 F. Supp. at 683.

The Division believes the decision below overstates the holding in Aiello and exaggerates its impact upon employers. Affirmance of the decision below would divest the EEOC and the Federal courts of power to apply Title VII to disparities in fringe benefits for maternity-related and other disabilities. Persons claiming to be aggrieved by such disparities could no longer rely upon guidelines issued by the EEOC, 29 C.F.R. § 1604.10(b), nor challenge such disparities by proving that they operate to exclude women from employment and earnings under the requirements for proof established in Griggs v. Duke Power Co., 401 U.S. 424 (1971) and McDonnell Douglas Corp. v. Green, 411 U.S.792 (1973). Instead, plaintiffs must prove much more: pretextual invidious discrimination based upon an employer's intent. The decision below would read one footnote in Aiello to curtail Title VII, to invalidate a regulation of the EEOC, and in effect to overrule a line of Federal decisions applying that regulation.

ARGUMENT

THE DECISION BELOW OVERSTATES THE HOLDING IN AIELLO AND EXAGGERATES ITS IMPACT UPON EMPLOYERS

In Geduldig v. Aiello, 41 L. Ed. 2d 256 (1974), the Supreme Court of the United States upheld under the Equal Protection Clause of the Fourteenth Amendment a state statute providing an employee-funded program of disability benefits which excludes disabilities resulting from normal pregnancy, normal delivery or normal recuperation. The majority regarded the statutory classification based on maternity as Constitutionally permissible.

> "While it is true that only a woman can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.... Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." 41 L.Ed. 2d at 264-5 n. 20.

The decision below reads Aiello as easing the obligations of employers under Title VII by permitting disparities in fringe benefits previously regarded as discriminatory.

Aiello, however, is a pronouncement as to the Constitutionality of a statutory classification, not an interpretation or application of fair employment legislation. Aiello declares that a State legislature in framing an employee-funded program of benefits for non-occupational

disabilities, may regard pregnancy and maternity as a legitimate, Constitutionally permissible classification, and may either include or exclude maternity-related disabilities. Aiello does not reach the question whether under fair employment legislation, the constitutionality of which is not in question, an employer may differentiate as to fringe benefits between employees who are pregnant and those who are not. Aiello did not arise under fair employment legislation or deal with a practice within any employer's control. Aiello does not overrule or modify the leading interpretations of Title VII, e.g. Griggs v. Duke Power Co., 401 U.S. 424 (1971), or Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (vacating a summary judgment under Title VII which permitted an employer to hire fathers, and reject mothers, of pre-school children).

In Green v. Waterford Board of Education, 473 F. 2d 629 (2d Cir. 1973), this Court found the "rational basis" test appropriate for appraising challenges under the Equal Protection Clause to legislative classifications based on sex. Under that test --

> "statutory or regulatory classifications are presumptively constitutional and will not be disturbed unless they are without rational basis, resting 'on grounds wholly irrelevant to the achievement' of some permissible state purpose", Feinberg, J., 473 F.2d at 632 (citations omitted).

This test is more demanding than the test for ascertaining discrimination under a fair employment statute. Under the rule in Griggs v. Duke Power Co., supra, 401 U.S. at 431, the test for ascertaining

statutory discrimination is simply whether the rule or practice "operates to exclude" employees of a particular race, color, religion, sex or national origin, and if so, whether the employer can prove it related to job performance or business necessity.

In two recent decisions the Supreme Court has demonstrated how wide is the difference between the standard for determining the Constitutionality of a statutory distinction between men and women and the standard for reviewing decisions under fair employment legislation. Kahn v. Shevin, U.S. , 40 L.Ed. 2d 189 (1974), upheld as constitutional a Florida statute allowing a tax exemption to widows, but not to widowers. Corning Glass Works v. Brennan, U.S. , 41 L.Ed.2d 1 (1974) construed the Equal Pay Act to require an employer to pay female inspectors on the day shift as much base pay as paid to male inspectors on the night shift.

A classification permissible to lawmakers under the Equal Protection clause in the framing of social welfare legislation can be forbidden to employers. Muller v. Oregon, 208 U.S. 412 (1908) and West Coast Hotel v. Parrish, 300 U.S. 379 (1937), which upheld as constitutional protective legislation as to women, did not preclude the Fifth Circuit from declaring discriminatory and hence invalid under Title VII sex-based prerequisites for employment. Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228 (5th Cir. 1969). Goesart v. Cleary, 335 U.S. 464 (1948), upholding under the Equal Protection Clause state legislation forbidding women from tending bar, did not preclude a lower Federal court from characterizing an employment policy based on such a statute as patently offensive under Title VII. Krause v. Sacramento Inn,

479 F. 2d 988 (9th Cir. 1973). The holding in Schattman v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1972), that a regulation issued by an employer not then subject to Title VII was permissible under the Equal Protection Clause did not preclude a lower court from subsequently holding the regulation invalid under amendments extending Title VII to cover the employer. Vick v. Texas Employment Commission, 6 E.P.D. ¶ 8933 (S.D. Tex. 1973). See Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 340 (D. Ore. 1969), where the Court applied Title VII to an order of the State wage and hour administrator and said: "The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act"; Wetzel v. Liberty Mutual Insurance Company, 372 F. Supp. 1146 (W.D.Pa. 1974), appeal pending, which holds that exclusion of pregnancy and maternity from an employer's income protection plan violates Title VII, the court saying at 1159: "While a fixed State policy of classification may survive an equal protection attack it may still be violative of Title VII."

The Division respectfully submits that the difference between these holdings as to Constitutional permissibility, on the one hand, and statutory impermissibility, on the other, is not explained by the mere passage of time, as suggested in the decision below, but rather by enactment, in the interim, of fair employment legislation. By such enactment, legislators demonstrated their right in exercise of the

police power or other legislative power to forbid to employers some of the classifications and differentiations which, absent such legislation, could be used without running afoul of the Equal Protection clause.

Aiello upholds not only the exclusion but also the inclusion of pregnancy within legislative coverage. Aiello specifies that lawmakers are Constitutionally free to "include" pregnancy within legislative coverage "on any reasonable basis." 41 L.Ed.2d at 264-5 n. 20. Under Aiello it is therefore permissible for an administrative agency to interpret fair employment legislation as declaring maternity-related disabilities to be like other temporary disabilities and as prohibiting employers from treating them differently. The Division and the EEOC interpret their respective fair employment statutes as doing just that. Both agencies have published guidelines providing that disabilities caused or contributed to by pregnancy are, for all job-related purposes, temporary disabilities and should be therefore included in any health or temporary disability insurance or sick leave plan available in connection with employment. The guideline of the EEOC to this effect, set forth at 29 C.F.R. § 1604.10(b), provides:

> "(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any

"health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

Several Federal cases have applied Title VII and that regulation to require employers to provide with respect to maternity-related disabilities the same benefits provided with respect to other disabilities. Wetzel v. Liberty Mutual Insurance Co., supra; Gilbert v. General Electric Company, 375 F.Supp.367 (E.D.Va.1974), appeal pending; Dessenberg v. American Metal Forming Co., 8 F.E.P. Cases 290 (N.D.Ohio 1973); see also Goodyear Tire & Rubber Co. v. Rubber Workers, Local 200, 8 E.P.D. ¶ 9657 (Ohio Ct. App. 1974), in which a state court upheld an award or arbitration based on the regulation quoted above and requiring payment of benefits for maternity-related disabilities to the same extent as benefits for other disabilities.

One Federal case, Newmon v. Delta Airlines, Inc., 7 E.P.D. ¶ 9154 (N.D.Ga. 1973), can be read as disallowing sick leave benefits for maternity - related disabilities. It is not clear from the court's opinion that the plaintiff limited her claim to the period of actual disability; she may, on the contrary, have claimed benefits for the entire term of pregnancy without regard to disability. The court relying on and construing the regulation, found in it no equation of disability with pregnancy as such.

The Supreme Court of the United States has declared the regulations and guidelines issued by the EEOC to be entitled to "great deference" and, if supported by Title VII and its legislative history, to acceptance

as an expression of the will of Congress. Griggs v. Duke Power Co., supra, 401 U.S. at 434.

Far from according deference either to the regulation itself or to the cases applying it, the decision below reads one footnote in the majority opinion in Aiello, 41 L.Ed. 264-5 n. 20, as modifying and even overruling these cases and as rendering the regulation virtually ineffective.

The decision below imposes upon persons claiming to be aggrieved by disparities in fringe benefits for maternity-related and other disabilities an unduly heavy burden of proof. Aggrieved persons can no longer look to the effect of such disparities, leaving to employers the burden of justifying them on the basis of business necessity, but must show pretextual invidious discrimination based upon the employer's intent to discriminate. Such an imposition conflicts head-on with Griggs v. Duke Power Co., supra and with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In effect, it casts upon the aggrieved person a burden equivalent to what must be discharged by someone challenging the Constitutionality of a statute. The Division respectfully submits that the decision below misconceives the appropriate standard for proving discrimination and misconceives the legal principles applicable to plaintiffs' complaint.

CONCLUSION

For the foregoing reasons, we respectfully request that the question certified to this Court be answered in accordance with the guidelines published by the Equal Employment Opportunity Commission, 29 C.F.R. § 1604.10(b), and that the decision below dismissing plaintiffs' complaint be reversed and the cause remanded to the District Court with directions to reinstate the complaint and to expedite the action in every practicable way.

Dated: New York, N. Y.
October 31, 1974

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the attached brief for the New York State Division of Human Rights as Amicus Curiae to be served on the parties and other amici herein, by mailing postage-prepaid copies thereof to the respective counsel, as follows:

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